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IN THE

Supreme Court of the United States

October 1970 Term

70-145

THOMAS L. WOOLDRIDGE ..... Petitioner

versus

COMMONWEALTH OF KENTUCKY ..... Respondent

RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE KENTUCKY COURT OF APPEALS

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Three copies of the within Brief were served upon counsel for Petitioner by mail this 22nd day of September 1971.

Laura L. Murrell

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MAY IT PLEASE THE COURT:

COUNTERSTATEMENT OF THE CASE

Petitioner was tried and convicted of damaging private property (Ky. Rev. Stat. 433.240) and possession of burglary tools (Ky. Rev. Stat. 433.120(2)) and given a five year prison sentence and a $500 fine.

The evidence on the trial that led to petitioner's conviction consisted primarily of the testimony of J. M. Mink, the owner and operator of a small motel near Stanford, Kentucky. Mr. Mink, who lived in an apartment in the motel, testified that he was awakened about 3:00 a.m. on the morning of April 12, 1968, by the sound of a car door being opened. He looked out his window and saw petitioner and another man identified as Ira J. Haynes get out of a car. He saw petitioner take a ratchet like tool out of

his car and walk over to a pay phone booth that was located on the first floor of the motel. Mr. Mink went downstairs to the phone booth. Petitioner then had the tool attached to the phone. When Mr. Mink walked up, he tried to hide the tool under his jacket and informed Mr. Mink that he was trying to call his wife. Mr. Mink turned and walked to a place where petitioner could not see him. Petitioner then pulled the device off the phone and ran and put it under the front seat of the car and drove away very rapidly. Mr. Mink got the car license number and called the police (Lincoln Circuit Court, Transcript of Evidence, pp. 19-23). As a result of this phone call, petitioner and Ira J. Haynes were picked up in an automobile bearing the same license number in the next town down the road and brought back to Stanford. A search warrant was obtained for the car, and a tool such as Mr. Mink described was found in the car along with a bag of coins. Mr. Mink identified the tool found in the car as the one he saw petitioner using, and he identified petitioner.

Both petitioner and Haynes were charged with various crimes arising out of the transaction. Sometime in October, petitioner apparently realized that his co-defendant was in a federal penitentiary in Indiana and would be unable to testify on his behalf in this trial. At that time his attorney got the circuit judge to enter an order that Ira J. Haynes was an essential witness and should be brought back. This was apparently preparatory to making arrangements with the federal authorities to bring Mr. Haynes back for the trial. However, an important snag in this plan developed. On November 14, three days before the scheduled trial, Mr. Haynes had not been returned to Lincoln County for the trial. At that time, petitioner made a motion for a continuance which stated as follows:

> "Ira J. Hanes, is now in the United States Penitentiary Terre Haute, Indiana; that said Ira J. Hanes is an essential witness to the presentation of the case for defendant herein, *that the Court has heretofore, on Oct. 19, 1968, ordered that said Ira J. Hanes be brought to*

> *Lincoln County for the purpose of testifying as a witness for this defendant; that the county officials, through its County Attorney has verbally declined and refused to pay the cost of returning said Ira J. Hanes to Lincoln County for the purpose of testifying in this matter; that this defendant is without sufficient funds to pay the cost of returning said Ira J. Hanes to Lincoln County;* that the testimony of said Ira J. Hanes can be secured at a future time; that the testimony of Ira J. Hanes is material to the defense of this defendant and could well effect the outcome of the trial; that the testimony which Ira J. Hanes would give is unavailable from any other source; and that this defendant has exercised good faith and deligence in attempting to secure the testimony of Ira J. Hanes; *that to require this Court to pay the cost of returning said Ira J. Hanes to Lincoln County for the purpose of testifying in the trial of Thomas C. Wooldridge would be placing an undue burden on this defendant, especially where said Ira J. Hanes is a co-defendant and charged with the same crime as this defendant; and the county should be ordered to pay the cost of returning this witness to Lincoln County* for the purpose of testifying in the matter as they would in all probability try said Ira J. Hanes on the next occasion he is present at Lincoln County." T.R. pp. 13-14. (Italics Added; underlining appears in official transcript.)

This motion did not state that petitioner was indigent, but simply stated that it was unfair to require him to pay the cost of transporting the witness when the state would then undoubtedly also choose to try him and take advantage of petitioner's expense. This motion was not accompanied by an affidavit, required by Kentucky Criminal Rules 9.04, stating what the witness would say and that such evidence was material. This motion was overruled on November 15. (Tr. of Record, p. 16). On the morning of the trial, an affidavit of the defendant was filed which stated as follows:

> "Comes the Affiant, Thomas C. Wooldridge, and after being duly sworn, states as follows:

1. That he is the defendant in the case of Commonwealth vs. Thomas C. Wooldridge in the Lincoln Circuit Court, Criminal Action No. 6363.

2. That the only witness in his behalf in this matter is Ira J. Hanes:

3. That he has been informed that said Ira J. Hanes is confined in the United States Penitentiary at Terre Haute, Indiana;

4. That he understands that it would be necessary for him to pay the expenses of said Ira J. Hanes, plus the expenses of a Federal Marshall to and from Stanford, Kentucky, for the purpose of having said Ira J. Hanes present to testify in his behalf.

5. That he understands that the expenses would be approximately $250.00 or $300.00;

6. That he is without funds with which to pay said expenses;

7. That said Ira J. Hanes is an essential and material witness to the presentation of Affiant's defense in this matter.

8. That if said Ira J. Hanes were present, he would testify that they stopped at the Golden Gate Motel for the purpose of making a long distance telephone call;

9. That the Affiant does not believe that he would get a fair and impartial trial without the presence of said Ira J. Hanes to personally testify and that he does not believe that he can get a fair presentation of his defense to the jury by the reading of an Affidavit as to what Ira J. Hanes would testify if present to testify in person.

WITNESS the hand of Affiant, this the 18th day of November, 1968."
(Transcript of Record, pp. 16-17).

This affidavit was considered by the Court in chambers prior to the trial and overruled, the trial judge stating as follows:

"The defendant further filed an affidavit that the co-defendant Ira J. Haynes was in the Federal penitentiary at Terre Haute, Indiana, and made the motion for the

Commonwealth to transport said Haynes to testify on the trial because the said Thomas Lee Wooldridge did not have funds in order to bring him to testify on his behalf. Whereupon, the Court, after reading the affidavit and both motions for continuance, overruled the motions for continuance, to all of which the defendant objected Said ruling was made after he had already entered an Order in October directing that the said Ira Haynes be returned to Lincoln County not later than November 12, 1968, and confined in the Lincoln County jail pending the trial of the above styled action. THE COURT: He is able to hire two attorneys; he is able to pay a bonding company to make a $10,000.00 bond. He has had plenty of notice as to the time for his trial. If he is able to hire two attorneys to represent him and able to pay a bondsman to come in here and make a $10,000.00 bond, that would refute his statement in the affidavit that he is not financially able to secure this witness who is in the federal pen in Indiana. He has made no effort on his own part to obtain the witness and he has relied wholly and solely upon the Court to bring him back here as a defense witness. If he is financially able, and everything would indicate that he is, it is his duty to procure his own witnesses and to have them here. For all of those reasons, the Court has refused to continue this case. There is no evidence and there is nothing that this man has done or said that would indicate that if this case were put off to next court he would be in any better position so far as this witness is concerned than he is right now, because he has made no effort on his own part to have the witness here. The Court, in response to the request, made an investigation of the federal officials necessary to bring the witness back here, and that is about as far as the Court feels it can go."

(Tr. of Evidence. pp, 1-2).

In response to this and a statement by the Commonwealth Attorney that the petitioner was solvent, his attorney stated:

". . . Further, by the defendant Thomas Lee Wooldridge paying the cost to bring the other man back to

testify for him, he would, in turn, be paying the cost of transporting him to the State of Kentucky for a trial of the within action, which the defendant Thomas Lee Wooldridge should not be required to do by any action of the Commonwealth." (Tr. of Evidence, p 6).

No further statements were made by petitioner's counsel that would in any way indicate that petitioner was in fact indigent and could not obtain the presence of the witness, or that the witness could testify to anything of any more significance than the statement, set out in the affidavit, that petitioner was stopping at the motel to make a phone call.

During the selection of the jury, the panel was exhausted after the selection of eleven jurors. The judge ordered one name drawn from the wheel and summoned. Petitioner's counsel objected to this procedure and moved that the entire panel be discharged. (Tr. of Evidence, p. 14).

At the very end of the entire trial the following exchange occurred:

"Q18 What does it say in the front of the book – who does it say it belongs to?

Mr. Rhodes: Objection. It was not exhibited by the Commonwealth.

The Court: You may say it was found in the box and the Commonwealth didn't present it – that's all.

BY AVOWAL:

Q. Mr. Harris, will you just tell the Court what is in the front of the book?

A. Tom's Auto Wreckers.

Q. Does it give an address?

A. 3010 Portland.

Q. Did that book come out of the car?

A. I'm sure it did.

Mr. Francis: Mark that D-2, as introduced through the Sheriff of Lincoln County.

END OF AVOWAL." (Tr. of Evidence, pp. 116, 117).

The defendant made no effort to introduce this evidence by direct evidence during his case. In fact, the defendant did not introduce any evidence at all.

The other evidence that petitioner complains of is the testimony of Ken Williams, an investigator from the telephone company who testified to the condition of the phone the day after petitioner's early morning visit to it, and to the nature and use of the tool Mr. Mink saw petitioner with, and to the nature and use of other tools found in petitioner's car. While, it is true, as petitioner asserts, that one of the tools was inoperative at the time of the trial, the witness testified that it was operative at the time the grand jury indicted petitioner but that a small part was missing at the time Mr. Williams testified. Mr. Mink then testified that he had seen petitioner fooling with the exhibit during a recess in the trial. This testimony appears at Tr. of Evidence, pp. 86-111.

REASONS FOR NOT GRANTING WRIT OF CERTIORARI IN THIS CASE

Petitioner asserts four issues as grounds justifying the issuance of certiorari in this case. Three of these issues are absolutely trivial and the fourth is without merit. Petitioner's claim that the judge improperly impaneled the jury could not conceivably justify the granting of certiorari. True, there was a technical violation of the statute – one name was picked from the jury wheel rather than two. But the petitioner moved that the entire panel be struck rather than that another name be drawn. The trial judge refused to do this, and the petitioner then accepted the jury. The Court of Appeals of Kentucky held that petitioner thereby failed to preserve error on this point. The

drawing of one name rather than two was a technical violation of a Kentucky statute, however, there was nothing inherently unfair about it and it raises no federal constitutional ground, and was not preserved in any event.

Petitioner next contends that he was not allowed to cross-examine the sheriff about a bank pass book found in petitioner's car. The Court of Appeals held that "We are unable to discern in what respect this passbook had any relevance to the issues on trial." Petitioner did not explain to the trial court how this might be relevant, and did not attempt to introduce it on direct. This again simply does not rise to any kind of a constitutional issue.

Petitioner's third contention is that the damaged telephone was introduced even though it had been dismantled during testing. The witness who introduced the exhibit explained exactly how this dismantling was done. There was no error here, let alone constitutional error.

Petitioner's fourth contention is that the trial court improperly denied petitioner a continuance until his co-defendant Ira J. Haynes could be obtained. The second half of this motion was to require the county to pay for the obtaining of Ira J. Haynes. The simple fact, as is set out in the statement of facts, is that the court had entered an order and taken steps to obtain the presence of Ira J. Haynes, but petitioner had refused to pay the cost of obtaining the witness. Petitioner continued to refuse to pay the cost and had not shown that he was financially unable to do so. He just contended that it would be unfair to require him to do so, since the county might choose to try Haynes while he was back in the Commonwealth. The failure of the state to provide a material witness to an indigent defendant who could not otherwise obtain such a witness might present a serious constitutional question even where the obtaining of the witness would not be by compulsory process but by cooperation with federal prison officials, *Barber v. Page*, 390 U. S. 719, 210 L.Ed. 2d 255, 88 S. Ct. 1318 (1968). However, in this case such an issue is not presented for several reasons. First, it is not shown

that the petitioner was indigent. Indeed everything in the record indicates that he was not. He had retained counsel. He was out on $10,000 bond prior to the trial and pending appeal. He took a direct appeal with retained counsel and paid the costs on that appeal. Even this petition for certiorari is not in forma pauperis. Secondly, petitioner made no showing that the missing witness was material. His affidavit said that the witness would testify that he had stopped to make a phone call. Mr. Mink testified that petitioner told him that. An accomplice's statement to the same effect in the face of the overwhelming evidence to the contrary could not have been material. Petitioner did not ask to have his statement of what Haynes would have said read to the jury, but the court would undoubtedly have allowed such had he asked. Under these circumstances, no possible constitutional question is presented. *Slawek v. United States*, 413 F. 2d 957 (1969); *Speers v. United States*, 387 F.2d 698 (1967), cert denied, 291 U.S. 934; *Fequer v. United States*, 302 F. 2d 214 (1962), cert denied, 371 U.S. 872.

CONCLUSION

For the foregoing reasons, this petition shows no reason why the decision of the Kentucky Court of Appeals presents a constitutional question of first impression, or is in conflict with prior decisions of this Court under Rule 19 of the Supreme Court Rules, the petition should therefore be dismissed.

Respectfully submitted,

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